PUBLIC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	
Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*)	**Docket No. 16-CRB-0003-PR (2018-2022) (Remand)**

SERVICES' JOINT OPPOSITION TO COPYRIGHT OWNERS' MOTION TO STRIKE EXHIBITS ATTACHED TO SERVICES' JOINT REPLY BRIEF

Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the "Services") respectfully submit this opposition to the National Music Publishers' Association and Nashville Songwriters Association International's (together, "Copyright Owners") July 20, 2021 Motion to Strike Exhibits Attached to Services' Joint Reply Brief (the "Motion").

INTRODUCTION

The Copyright Owners, having noticed and taken the depositions of Professors Katz and Marx as part of this remand proceeding, now run from the evidence they adduced at these depositions. Apparently unhappy with what Professors Katz and Marx had to say in response to their questions, the Copyright Owners move to strike the Services' reply exhibits containing the professors' full deposition testimony. The Copyright Owners assert that providing the Judges with the full deposition transcripts—rather than just with the excerpts that the Copyright Owners chose to attach to their own reply filing—was "procedurally improper" and would set "troubling precedent." The Copyright Owners also contend that the deposition testimony of Professors Katz and Marx does not constitute rebuttal evidence when the Services cite to the transcripts but does

when the Copyright Owners cite to those same transcripts. The Copyright Owners are wrong on all counts: (1) no regulation or case law supports their procedural argument; (2) a troubling precedent would only be set if the Judges adopted the Copyright Owners' position that only they can cite to this deposition testimony and that it is improper for a participant to provide the Judges with the full context of its expert's deposition; and (3) they have failed to demonstrate that the portions of the testimony the Services cited in their reply is not rebuttal. The Judges should deny the motion.

ARGUMENT

The Copyright Owners first assert that submitting the full transcripts of the depositions of Professors Katz and Marx as part of the Services' rebuttal filing was "procedurally improper," (Motion at 1), but they cite no authority supporting that claim. The Copyright Owners' argument instead rests on an untenable interpretation of the Judges' December 23, 2020 Order Adopting Schedule for Proceedings on Remand (eCRB No. 23413) (the "Scheduling Order"). Nothing in that Scheduling Order says that deposition testimony taken as part of this remand proceeding cannot be used as rebuttal evidence. To the contrary, the Scheduling Order explicitly allows for the filing of rebuttal evidence as part of a party's rebuttal case. Scheduling Order at 2. Indeed, the Copyright Owners recognize that deposition testimony can be used as rebuttal evidence, as they too cite the deposition transcripts in their own reply filing. *See, e.g.*, Copyright Owners' Reply Remand Brief at 53 n. 40; *id.* at 56 (citing Katz remand deposition transcript). But the Copyright Owners elected to provide the Judges only with excerpts of those transcripts and, through this motion, seek to prevent both the Judges from having access to the remainder of those experts' testimony and the Services from citing to those same transcripts.

The Copyright Owners also note that Professors Marx and Katz "are witnesses hired by the Services," apparently suggesting that the Services may not rely on their own witnesses' deposition testimony. Motion at 2. But that is irrelevant to the question of whether the testimony—which was elicited by the Copyright Owners' counsel's questions—can be used as rebuttal evidence. No law supports the Copyright Owners' apparent positions that: (1) only they can cite to the deposition transcripts of the Services' experts; and (2) they have full control over which portions of the deposition transcripts are provided to the Judges. Evidence is evidence—it is not exclusively for the use of one party or another.[1]

Next, the Copyright Owners assert that including the full deposition transcripts in the record would set a "troubling precedent." Motion at 1. But they do not explain what specifically that precedent would be, why that precedent would be troubling, or what implications it could have beyond this proceeding (which, by virtue of being a remand proceeding, is different from a normal-course rate-setting proceeding). Moreover, there is nothing "troubling" about providing the Judges with rebuttal evidence (so long as that evidence qualifies as appropriate rebuttal). And providing the entire deposition transcripts containing this rebuttal evidence, rather than just excerpts as the Copyright Owners did, only serves to provide the Judges with access to the full context of the sworn testimony at issue, thereby ensuring that no one has "cherry-picked" deposition excerpts or

[1] As the Copyright Owners are aware, it is standard practice for parties in CRB (and other) proceedings to cite oral testimony of their own witnesses as part of reply submissions. The Copyright Owners did this throughout their reply filings in this proceeding. *See, e.g.*, Copyright Owners' Reply to Services' Joint Proposed Findings of Fact and Conclusions of Law, eCRB Dkt. No. 14174 at 14 (citing to Copyright Owner witness David Israelite's testimony in an effort to rebut arguments made by the Services in their proposed findings of fact); *id.* at 79 (citing Dr. Eisenach's hearing testimony). The Judges likewise relied on the oral testimony of experts elicited on cross-examination, as they were entitled to do, even if that testimony was not expressed in "written expert witness statements" containing "citations and exhibits and identification of materials relied upon." Motion at 2. *See, e.g.*, Final Determination at 63-64 (noting that on cross-examination, Professor Gans acknowledged that he did not perform a full-fledged Shapley Analyses); *id.* at 67 (noting that on cross-examination, Professor Gans acknowledged that in a different proceeding, he combined multiple downstream entities into a single entity in a Shapley analysis, despite the fact that he criticized Professor Marx in this proceeding for doing the same).

taken those excerpts out of context. Indeed, the only "troubling precedent" that could be set here would be to adopt the Copyright Owners' apparent position that only the participant taking the deposition is allowed to use the transcript as rebuttal evidence.

Finally, the Copyright Owners argue that—when the Services cite them—the deposition transcripts are not proper rebuttal evidence and are instead "inappropriately submitted to try to buttress the Services' initial submission." Motion at 2. If the Copyright Owners' contention were correct, this would be proper grounds for striking the evidence at issue, *see* Services' Motion to Strike Copyright Owners' Expert Testimony (eCRB No. 25537) at 5-7, but the Copyright Owners are wrong. As an initial matter, the Services' could not have incorporated this deposition testimony into their opening submission, because the depositions were not taken until *after* that submission was filed. Moreover, the Services cite as evidence those portions of the remand deposition testimony of Professors Katz and Marx that directly refute arguments the Copyright Owners made in their opening submission.

On page 37 of their Reply Brief, the Services quote the remand deposition testimony of Professor Marx to rebut the Copyright Owners' contention in their opening submission that an uncapped TCC prong for subscription interactive services satisfies the fourth Section 801(b)(1) factor. Professor Marx's testimony takes that contention on directly, explaining that [redacted]" This testimony is textbook rebuttal. That fact does not change merely because the Copyright Owners elicited the testimony in response to a deposition question.

On pages 40-42 of the Services' Joint Reply Brief, the cited testimony from Professor Marx's and Professor Katz's depositions directly rebuts the Copyright Owners' efforts in their

opening remand submission to demonstrate that the see-saw theory is valid and that it was appropriate for the Judges to rely on it. The cited deposition testimony—which, as noted, could not have been incorporated into the Services' opening submission since the depositions had not yet occurred—provides several different reasons why the arguments raised by the Copyright Owners in their opening submission are wrong. Services Reply Br. at 40 (Professor Marx explaining that she [redacted]); *id*. at 41 (Professor Marx explaining that [redacted]); *id*. (Professor Katz explaining that [redacted]); *id.* at 42 (Professor Katz explaining that, [redacted]). This testimony, too, is clearly rebuttal.

While not referenced in the Copyright Owners' motion, the two other instances in which the Services cite to the remand deposition testimony of Professor Marx are also plainly rebuttal. At page 49 of the Services' Joint Reply Brief, Professor Marx's cited testimony directly rebuts the Copyright Owners' contention raised in their opening submission that the Services failed to introduce any evidence that the major labels form a complementary oligopoly. In the cited testimony, Professor Marx [redacted] that supports that very claim. And at page 51 of the Services' Joint Reply Brief, Professor Marx's deposition testimony is used to rebut the Copyright Owners' misplaced assertion that an uncapped TCC prong for subscription interactive services must be reasonable because the Services' proposed maintaining uncapped TCC prongs for other less economically consequential offerings. As Professor Marx explained at her remand deposition, [redacted]

[redacted]. Both of these uses of the Marx remand deposition transcript are proper rebuttal.

All told, the Copyright Owners offer no credible basis for striking from the record the full remand deposition transcripts of Professors Marx and Katz or from preventing the Services from relying on testimony that the Copyright Owners' counsel elicited through his questioning. The Copyright Owners' transparent efforts to run from the very evidence they elicited should be rejected.

CONCLUSION

For the foregoing reasons, the Services respectfully request that the Judges deny the Copyright Owners' Motion.

DATED: August 3, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, August 03, 2021, I provided a true and correct copy of the Services' Joint Opposition to Copyright Owners' Motion to Strike Exhibits Attached to Services' Joint Reply Brief to the following:

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